SUPREME COURT, U. S.

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-1794

OSCAR H. KLEE, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WENDY WILLIAMS, ESQ.
433 Turk Street
San Francisco, California
94102

DAVID J. COOPER, ESQ.
2320 Pine Street
San Francisco, California
94115

Counsel for Petitioner

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutory and Constitutional Provisions Involved	2
Statement of the Case	3
Reasons for granting the writ	5
1. The Decision Below has Decided an Important Question of Federal Law Which Has Not Been But Should Be Settled by This Court	5
2. The Lower Court's Opinion is in Conflict with the Decisions of Other Circuits with Respect to the Prejudice to be Inferred from the Misconduct Alleged, and in the Procedural Manner in Which Such Allegations Should be Handled	9
3. This Court Should Clarify Its Decision in United States v. Bishop, 412 U.S. 346 (1973) Concerning the Meaning of the Term "Willfully" as Used in 26 U.S.C. §7203	12
4. The Court Should Render a Definitive Opinion on Whether the Constitution Confers Upon a Criminal Defendant the Right to Appear Both on His Own Behalf and Through Counsel	13
Conclusion	14
Appendix (Opinion and Judgment of Court of Appeals)	App. 1

CITATIONS

Cases:

Downey v. Peyton, 451 F.2d 236 (4th Cir. 1971)	11
Estes v. Texas, 381 U.S. 532, 542-43 (1965).	9

Farese v. United States, 428 F.2d 178 (5th Cir. 1970)..... 8, 10
Felton v. United States, 96 U.S. 699 (1877)..... 12, 13
Gafford v. Warden, United States Penitentiary, Leavenworth, Kansas, 434 F.2d 318 (10th Cir. 1970) 8
Gonzalez v. Beto, 405 U.S. 1052 (1972)..... 8, 9
Maddox v. United States, 146 U.S. 140 (1892)..... 8, 11
Myres v. United States, 174 F.2d 329, 335 (8th Cir. 1949) 7, 10
Parker v. Gladden, 385 U.S. 363 (1966).. 8, 9, 11
Pekar v. United States, 315 F.2d 319 (5th Cir. 1963) 8
Rotolo v. United States, 404 F.2d 316, 317 (5th Cir. 1968) 7
Turner v. Louisiana, 379 U.S. 466, 472 (1965) 7, 9
United States v. Bishop, 412 U.S. 346 (1973) 12, 13
United States v. Bukowski, 435 F.2d 1094 (7th Cir. 1970)..... 10
United States v. Carter, 430 F.2d 1278, 1279 (10th Cir. 1970) 7, 9
United States v. Collier, 362 F.2d 135 (7th Cir. 1966) 10
United States v. Goliday, 468 F.2d 170, 171 (9th Cir. 1972) 12
United States v. Maxwell, 383 F.2d 437 (2nd Cir. 1967) 10
United States v. McKinney, 429 F.2d 1019 (5th Cir. 1970) 8, 11
United States v. McKinney, 434 F.2d 831 (5th Cir. 1970) 8, 11
United States v. Murdock, 290 U.S. 389, 394-95 (1933) 12
United States ex. rel. Owen v. McMann, 435 F.2d 813 (2d Cir. 1970) 8, 9, 11, 12
United States v. Plattner, 330 F.2d 271 (2d Cir. 1964) 13
United States v. Steed, 465 F.2d 1310 (9th Cir. 1972) 10

United States v. Thomas, 463 F.2d 1061 (7th Cir. 1972) 8, 11
United States v. Viale, 312 F.2d 595 (2d Cir. 1963) 6
Winebrenner v. United States, 147 F.2d 322 (8th Cir. 1945) 6, 7, 9, 10

Miscellaneous:

Brickwood's Sackett on Instructions to Juries §98 (3 Ed., 1908) 6
71 Calif. L. Rev. 1479, Comment, Self-Representation in Criminal Trials: The Dilemma of the Pro Se Defendant 14
C.J.S. Criminal Law, Vol. 23A, §1361 (1961) .. 6
Devitt & Blackman, Federal Jury Practice & Instructions, §§5.03, 80.16 (1970) 6
McBride, The Art of Instructing the Jury, §3.18 (1969) 6
Wright, Federal Practice and Procedure, §486.. 6

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PETITION FOR A WRIT OF CERTIORARI TO THE
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FOR THE NINTH CIRCUIT

The Petitioner, OSCAR H. KLEE, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on March 27, 1974.

OPINION BELOW

The opinion of the Court of Appeals not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the Northern District of California.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 27, 1974. A timely petition for rehearing en banc was denied on May 1, 1974, and this petition was filed within

30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a criminal defendant's Fifth and Sixth Amendment rights are substantially affected by conduct of the jury which involves premature conversations concerning the case, and widespread expressions as to the defendant's guilt prior to the time the case is submitted to the jury for deliberation and verdict.

2. Whether the term "willfully" as used in 26 U.S.C. §7203 involves a mens rea more substantial than the intentional violation of a known legal duty.

3. Whether a criminal defendant, otherwise qualified, has a right under the Fifth and Sixth Amendments to appear both pro se and through counsel.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

FIFTH AMENDMENT, CONSTITUTION OF THE UNITED STATES:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT, CONSTITUTION OF THE UNITED STATES:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial,

an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

United States Code, Title 26

§7203. Willful failure to file return, supply information, or pay tax:

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of Section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

STATEMENT OF THE CASE

An Information was filed in three counts of 26 U.S.C. §7203 before the Honorable Albert C. Wollenberg, United States District Judge for the Northern District of California, on February 11, 1973, charging Petitioner with willfully failing to file Federal Income Tax Returns for the tax years 1966, 1967, and 1968. Prior to trial, Petitioner noticed a Motion to Appear pro se to assist his attorney of Record (Clerk's Transcript: 43) this motion being denied (Clerk's Transcript:

132, 136, 304). The motion was renewed on several occasions, and on each and every occasion was denied.

Trial by jury commenced on June 18, 1973 and on June 22, 1973, the jury returned a verdict of guilty on each count. A primary issue during the trial of Petitioner's cause was whether his alleged failure to file was willful within the meaning of 26 U.S.C. §7203. Petitioner objected to the trial court's instruction on the element of "willfulness," and specifically in failing to give Petitioner's proposed instruction (Reporter's Transcript 4:604).

On July 12, 1973, Petitioner filed a motion for a new trial or in the alternative for a hearing on whether a new trial should be held alleging prejudicial misconduct by the jury. This motion was supported by the affidavit of one of the jurors which disclosed that throughout the course of the trial and prior to submission of the matter for deliberation and verdict, at least eleven of the fourteen jurors (twelve regular and two alternate) engaged in continuing and extensive conversations concerning the case before them and that during the course of these conversations, nine of the fourteen jurors expressed their respective opinions that the defendant was obviously guilty (Clerk's Transcript: 273-275). On July 20, 1973, the trial court accepted the allegations as true

and yet denied Petitioner's motion for either a new trial or a hearing on whether a new trial should be held. Petitioner was sentenced to six months imprisonment on each count, said sentences to run concurrently.

The Court of Appeals affirmed Petitioner's conviction in every respect.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

Petitioner's allegations of juror misconduct were evidenced by the affidavit of one of the jurors (Clerk's Transcript, pp. 273-275). In essence, the juror-affiant disclosed that throughout the course of the trial and prior to the beginning of formal deliberations, eleven of the fourteen jurors (twelve regular and two alternate) engaged in extensive, systematic and continuing discussions concerning the case before them and that during the course of these discussions, nine of the fourteen jurors expressed their respective opinions that petitioner was "obviously guilty." These discussions and premature expressions of opinions were held despite the trial court's frequent admonitions against such conduct. In accepting these allegations as true and yet denying petitioner's motion for a new trial, both the trial court and the Ninth Circuit necessarily

held that such misconduct carried no substantial possibility of prejudice to Petitioner's rights under the Fifth and Sixth Amendments to the Constitution of the United States.

While it has long been the practice of most courts to admonish the jury from premature discussions or the premature formation of opinions concerning the case before it,[1] this Court has never had occasion to rule on the necessity of such an admonition, and the circuits are in disagreement concerning its necessity. Compare, Winebrenner v. United States, 147 F.2d 322 (8th Cir. 1945) with United States v. Viale, 312 F.2d 595 (2d Cir. 1963).

Furthermore, Petitioner's case represents the first occasion upon which any of the circuits have been faced with evidence of a substantial disregard of the admonition, and therefore the first occasion to rule upon the significance of such misconduct. Winebrenner, supra, held that an admonition which

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[1] See, e.g., Devitt & Blackman, FEDERAL JURY PRACTICE AND INSTRUCTIONS, §§5.03, 80.16 (1970); McBride, THE ART OF INSTRUCTING THE JURY, §3.18 (1969); Brickwoods Sackett on INSTRUCTIONS TO JURIES §98 (3 Ed., 1908); Wright, FEDERAL PRACTICE AND PROCEDURE §486; 23A C.J.S. CRIMINAL LAW §1361 (1961); Winebrenner v. United States, 147 F.2d 322 (8th Cir. 1945).

permitted a limited discussion of the case denied criminal defendants their due process rights to a fair trial, stressing that such discussions and premature formations of opinion effectively shifted the burden of proof to the defendant, denied a defendant his right to have his cause judged on the evidence viewed in its entirety, and denied him his right to have his cause judged by the whole jury, rather than "coteries" of jurors which might include alternates.

Those cases which appear to limit Winebrenner v. United States, 147 F.2d 322 (8th Cir. 1945), base their holdings upon the absence of evidence that any discussions actually took place, thus shifting the focus from the propriety or necessity of an admonition (or lack thereof) to the existence or nonexistence of any jury misconduct. See, e.g., United States v. Carter, 430 F.2d 1278, 1279 (10th Cir. 1970); Rotolo v. United States, 404 F.2d 316, 317 (5th Cir. 1968); Myres v. United States, 174 F.2d 329, 335 (8th Cir., 1949).

As noted by the trial court in the instant case, the issue presented is one of great practical importance to the orderly administration of the federal judicial system (Reporter's Transcript, 6:792), affecting the rights of all defendants in jury trials, and the standard of conduct which can be expected of the jury. cf., Turner v. Louisiana,

379 U.S. 466, 472 (1965).

This Court and the various circuits have repeatedly recognized in a wide variety of circumstances that misconduct by a juror or jurors may so prejudice a defendant's rights as to require a reversal of his conviction and the granting of a new trial.[2]

However, the courts have rarely been confronted with misconduct of a concededly substantial nature which is primarily limited to the jurors themselves.

Thus, this writ offers the Court its first opportunity to consider not only the propriety of the premature discussions and expressions of opinions by a substantial number of jurors concern-

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[2] See, e.g., Gonzalez v. Beto, 405 U.S. 1052 (1972); Parker v. Gladden, 385 U.S. 363 (1966); Remmer v. United States, 347 U.S. 227 (1954); Maddox v. United States, 146 U.S. 140 (1892); United States v. Thomas, 463 F.2d 1061 (7th Cir. 1972); United States ex. rel. Owen v. McMann, 435 F.2d 813 (2d Cir. 1970; cert. den. 402 U.S. 906 (1970)); Gafford v. Warden, United States Penitentiary, Leavenworth, Kansas, 434 F.2d 318 (10th Cir. 1970); United States v. McKinney, 429 F.2d 1019 (5th Cir. 1970, rev'd on rehearing on other grounds); United States v. McKinney, 434 F.2d 831 (5th Cir. 1970); Farese v. United States, 428 F.2d 178 (5th Cir. 1970); Pekar v. United States, 315 F.2d 319 (5th Cir. 1963).

ing the case before it but also the liklihood of prejudice that such conduct carries--whether inherently prejudicial within the meaning of Estes v. Texas, 381 U.S. 532, 542-43 (1965), cf., Winebrenner v. United States, 147 F.2d 322 (8th Cir., 1945); or carrying a heavy presumption of prejudice within the meaning of, for example, Gonzalez v. Beto, 405 U.S. 1052 (1972), Parker v. Gladden, 385 U.S. 363 (1966) and Turner v. Louisiana, 379 U.S. 466, 472 (1965); or some probability of prejudice to be decided upon a case by case basis within the meaning of United States ex. rel. Owen v. McMann, 435 F.2d 813, 818 (2d Cir., 1970); or no substantial liklihood of prejudice whatsoever, within the meaning of, for example, United States v. Carter, 430 F.2d (10th Cir., 1970).

2. THE LOWER COURT'S OPINION IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS WITH RESPECT TO THE PREJUDICE TO BE INFERRED FROM THE MISCONDUCT ALLEGED, AND IN THE PROCEDURAL MANNER IN WHICH SUCH ALLEGATIONS SHOULD BE HANDLED.

(a) As previously noted, Winebrenner, supra, did not reach the issue of actual misconduct, its decision going to the propriety of the admonition given. However, it clearly stands for the proposition that premature discussion and expression of opinions by the jury concerning the cause before it constitutes a denial of a defendant's due process right to a fair trial. The decision below

expressly disapproves of this approach, creating a clear conflict in principle between the Eighth and Ninth Circuits concerning the probable effect of such conduct upon a defendant's right to a fair trial.[3]

While the issue has not been reached in other circuits, the potential for prejudice inherent in such misconduct has been recognized in a variety of circumstances.[4]

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[3] While Winebrenner, supra, has been limited in the Eighth Circuit by Myres v. United States, 174 F.2d 329 (8th Cir. 1949), this limitation in no way rests upon the effects of such conduct by the jury, but rather upon the necessity of demonstrating that such misconduct occurred (174 F.2d at 335).

[4] Three cases in particular show the care with which the trial court has dealt with situations when it became known that a juror had expressed an opinion concerning a case prior to its completion: United States v. Steed, 465 F.2d 1310 (9th Cir. 1972, cert. den. 409 U.S. 1078 (1972)); United States v. Maxwell, 383 F.2d 437 (2d Cir. 1967); United States v. Collier, 362 F.2d 135 (7th Cir. 1966). In each, the offending juror was replaced and the trial permitted to continue only after it was ascertained that the views had not been expressed to fellow jurors. The United States has also, on occasion, deemed the admonition important. See, e.g., United States v. Bukowski, 435 F.2d 1094 (7th Cir. 1970, cert. den. 402 U.S. 911); cf. Farese v. United States, 428 F.2d 178, 179-80 (5th Cir. 1970).

Petitioner submits that there is a clear conflict in principle among the circuits as to the prejudicial nature of the premature discussion and formation of opinions by a juror or jurors which requires resolution by this Court.

(b) The decision below emphasized that the juror-affiant did not allege that any of the jurors relied on evidence outside of the record in reaching their verdict or that any of the jurors actually decided upon the defendant's guilt before the case was submitted. In so doing, the court rendered a decision in direct conflict with decisions of this Court and other circuits which, in essence, make a juror competent to testify as to events or instances of misconduct, but incompetent to testify as to the actual influence such misconduct had on the verdict rendered.[5]

The conflict which exists by virtue of this ruling is multifold in that it requires a defendant

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[5] Parker v. Gladden, 385 U.S. 363 (1966); Maddox v. United States, 146 U.S. 140 (1892); United States v. Thomas, 463 F.2d 1061 (7th Cir. 1972); Downey v. Peyton, 451 F.2d 236 (4th Cir. 1971); United States ex. rel. Owen v. McMann, 435 F.2d 813 (2d Cir. 1970, cert. den. 402 U.S. 906 (1970)); United States v. McKinney, 429 F.2d 1019 (5th Cir. 1970, rev'd on rehearing on other grounds); United States v. McKinney, 434 F.2d 831 (5th Cir. 1970).

in the Ninth Circuit to offer evidence as to the actual mental process by which a jury reached a verdict in contravention of the prevailing rule; it makes the question of prejudice one of fact rather than one of law in contravention of the prevailing rule (cf. United States ex. rel. Owen v. McMann, 435 F.2d 813, 820 (2d Cir. 1970)); and it places a burden upon the defendant to demonstrate prejudice if misconduct is deemed to have occurred, rather than upon the prosecution to demonstrate a lack of prejudice (cf. United States v. Goliday, 468 F.2d 170, 171 (9th Cir. 1972)).

3. THIS COURT SHOULD CLARIFY ITS DECISION IN UNITED STATES v. BISHOP, 412 U.S. 346 (1973) CONCERNING THE MEANING OF THE TERM "WILLFULLY" AS USED IN 26 U.S.C. §7203.

As reprinted in footnote 1 of the lower court's decision, the trial court's instruction regarding the term "willfully" essentially equated it with the intentional violation of a known legal duty, as distinguished, for example, from an inadvertant, negligent, or reckless violation. Such a distinction would certainly make the instruction given in Felton v. United States, 96 U.S. 699 (1877) erroneous, and yet this Court in United States v. Bishop, supra, explicitly referred to the "bad purpose or evil motive" test of United States v. Murdock, 290 U.S. 389, 394-95 (1933) which, in turn, simply restated the test used in

Felton, supra. Because of past conflicts which have existed among the circuits concerning this question, this Court should reconsider its decision in United States v. Bishop, supra, and definitively state whether the bad purpose or evil motive to which it refers is used simply to distinguish intentional from reckless or negligent conduct, or whether it is used to require a mens rea which involves an intent to defraud the government, or to conceal from the government facts relevant to a determination of one's tax liability.

4. THE COURT SHOULD RENDER A DEFINITIVE OPINION ON WHETHER THE CONSTITUTION CONFERS UPON A CRIMINAL DEFENDANT THE RIGHT TO APPEAR BOTH ON HIS OWN BEHALF AND THROUGH COUNSEL.

While the right to assistance of counsel is expressly conferred upon a defendant in a criminal trial by the Sixth Amendment, and while the right to appear pro se without the assistance of counsel has been inferred from the Fifth and Sixth Amendments (see, e.g., United States v. Plattner, 330 F.2d 271 (2d Cir., 1964)) this Court has not ruled on whether it may under some circumstances be mandatory to confer upon a defendant the opportunity to exercise both rights simultaneously. It is time for this Court to consider whether a criminal defendant, in exercising his right to the assistance of counsel, automatically waives his right to appear

pro se. cf., Comment, Self-Representation in Criminal Trials: The Dilemma of the Pro Se Defendant, 71 CALIF. L. REV. 1479.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

WENDY WILLIAMS, ESQ.
433 Turk Street
San Francisco, California 94102

Counsel for Petitioner

DAVID J. COOPER, ESQ.
2320 Pine Street
San Francisco, California 94115

Counsel for Petitioner

Dated: May 29, 1974

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

OSCAR H. KLEE,
Defendant-Appellant.

No. 73-2741

[March 27, 1974]

On Appeal from the United States District Court
for the Northern District of California

Before: KOELSCH and DUNIWAY, Circuit Judges,
THOMPSON,* District Judge

OPINION

DUNIWAY, Circuit Judge:

Klee was found guilty by a jury under three counts of an indictment charging willful failure to file federal income tax returns for the years 1966, 1967, and 1968, in violation of 26 U.S.C. §7203. On appeal he alleges that nine errors were committed during his trial. Most of them do not merit discussion.

1. *Instruction defining "willfully."*

Klee asserts that the trial court incorrectly instructed the jury on the meaning of the term "willfully" as used in 26 U.S.C.

*The Honorable Bruce R. Thompson, United States District Judge for the District of Nevada, sitting by designation.

§7203.[1] He asserts that the jury should have been instructed that the term "willfully" requires the government to prove "an intent to defraud the government, or to conceal from the government facts relevant to a determination of the accused's tax liability." The law is to the contrary. *United States v. Andros*, 9 Cir., 1973, 484 F.2d 531, 534. Klee attempts to rely upon *United States v. Bishop*, 1973, 412 U.S. 346, yet nothing in that opinion undermines the validity of the instruction given by the trial judge here. The court's instruction is in substantial compliance with the *Bishop* Court's requirement. See 412 U.S. at 360-61.

2. *Juror Misconduct.*

When the morning recess occurred during the selection of the jury, the court admonished the jurors:

> "Don't discuss the case among yourselves, and don't allow anyone to approach you and address you concerning the case. Do not form or express any opinion on the case until it is finally submitted to you by the Court for your decision."

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[1]The court instructed, in part:

"The term willfully used in the statute which I have read to you, that is, referring to one who willfully fails to make such a return, means voluntary, purposeful, deliberate and intentionally, as distinguished from accidental, inadvertent, or negligent.

Mere negligence, even gross negligence, is not sufficient to constitute willfulness under the criminal law.

The failure to make a timely return is willful if the defendant's failure to act was voluntary and purposeful, and with the specific intent to fail to do what he knew the law requires to be done; that is to say, with a bad purpose or evil motive to disobey or disregard the law which requires to (sic) file a timely return which discloses to the government facts material to the determination of his tax liability.

There is no necessity that the government prove that the defendant had an intention to defraud it, or to evade the payment of any taxes, for the defendant's failure to file to be willful under this provision of the law.

On the other hand, the defendant's conduct is not willful if you find that he failed to file a return because of negligence, inadvertence, accident or reckless disregard for the requirements of the law, or due to his good faith misunderstanding of the requirements of the law."

A similar admonition was given at the end of the first day of trial. Thereafter, when a recess was taken, the court usually reminded the jury of his admonition, without repeating it.

In support of a motion for a new trial, Klee presented an affidavit of one of the jurors which says that eleven of the fourteen jurors (including alternates) discussed the case during recesses and that nine of the jurors expressed premature opinions about Klee's guilt. If the affidavit is true, the jurors disregarded the court's admonition.

While we are aware that most judges give similar admonitions to juries, we have never had occasion to pass upon either the propriety of or the necessity for such an admonition. The circuits are not in agreement on the question. See, *e.g.*, *Winebrenner v. United States*, 8 Cir., 1945, 147 F.2d 322; 23A C.J.S. *Criminal Law* §1361 (1961). *But cf. United States v. Carter*, 10 Cir., 1970, 430 F.2d 1278, 1279; *Rotolo v. United States*, 5 Cir., 1968, 404 F.2d 316, 317; *United States v. Viale*, 2 Cir., 1963, 312 F.2d 595, 602. Judge Woodrough, dissenting in *Winebrenner, supra*, said:

> "No normal honest Americans ever worked together in a common inquiry for any length of time with their mouths sealed up like automatons or oysters."

We think that there is a good deal in what he says. The important thing is not that jurors keep silent with each other about the case but that each juror keep an open mind until the case has been submitted to the jury. Be that as it may, we need not reach the problem of the propriety of the admonition here.

This is not a case that involves "any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury." *Remmer v. United States*, 1954, 347 U.S. 227, 229 nor does it involve the influence of the press upon the jury. *Silverthorne v. United States*, 9 Cir., 1968, 400 F.2d 627.

What is involved here is the premature discussion among the jurors themselves about the case. Assuming that there was juror misconduct, it is still true that not every incident of juror misconduct requires a new trial. *United States v. Goliday*, 9 Cir., 1972, 468 F.2d 170, 171; *United States v. Collier*, 7 Cir., 1966,

362 F.2d 135, 137-8; *United States v. Bando,* 2 Cir., 1957, 244 F.2d 833, 848-9; *Cavness v. United States,* 9 Cir., 1951, 187 F.2d 719, 723. The test is whether or not the misconduct has prejudiced the defendant to the extent that he has not received a fair trial. *Cavness v. United States, supra,* 187 F.2d at 723.

The juror's affidavit here does not assert that any of the jurors relied upon any evidence outside of the record in reaching their verdict, nor does it assert that any of the jurors actually decided upon the defendant's guilt before the case was submitted to them. The trial judge carefully examined the affidavit's allegations and ruled that even if everything in the affidavit were true a new trial was not required. Though the judge expressed his disapproval of such juror conduct, he commented that "the question is whether such conduct prejudiced defendant's right to a fair trial by an impartial jury." He correctly observed that "the only genuine issue in dispute was defendant's state of mind. On this point the jury demonstrated its open-mindedness by requesting re-reading of the instructions on willfulness before bringing in its verdict." The trial judge therefore held that "[u]nder all these circumstances the Court finds that the affidavit does not present any questions which requires further inquiry and does not justify a new trial."

When a wise and experienced judge, who presided at the trial and observed the jury, comes to such a conclusion, it is not for us to upset it. The trial judge "was in a better position than we are to determine whether what happened was prejudicial." *United States v. Goliday, supra,* 468 F.2d at 172, *cf. United States v. Noah,* 9 Cir., 1973, 475 F.2d 688, 692. It was not error to deny the motion for a new trial.

3. *Klee's motion to appear pro se and through counsel.*

The denial of Klee's motion was not error. He had two competent counsel. He does not like the income tax law, or his obligation to file income tax returns. His obvious motive was to be able to spout his notions to the jury without having to take the witness stand. The constitution guarantees Klee the effective assistance of counsel; it does not give him absolute discretion to dictate the form of that representation. Klee does not assert that he

was denied effective representation. What Klee wanted was equal status with his attorneys and full rights of participation at every stage of the proceedings. The trial court offered him the opportunity to participate at various stages of the trial but in the interest of courtroom order he limited Klee's activity. The court's action was proper. See *Lofton v. Procunier*, 9 Cir., 1973, 487 F.2d 434, 435. In *Nelson v. People of the State of California*, 9 Cir., 1965, 346 F.2d 73 at 81, we said that "counsel must be the manager of the lawsuit" and that "[o]ne of the surest ways for counsel to lose a lawsuit is to permit his client to run the trial." *See also Kuhl v. United States*, 9 Cir., 1966 (in banc), 370 F.2d 20, 27. Those observations are pertinent here.

4. *Klee's December 13, 1971 tax return.*

Klee filed a tax return on December 13, 1971. It contained absolutely no information about Klee's tax status but merely stated "all details available on proper demand." Klee cannot legitimately claim that this return fulfilled his obligation to file. "A taxpayer's return which does not contain any information relating to the taxpayer's income from which the tax can be computed is not a return within the meaning of the Internal Revenue Code or the regulations adopted by the Commissioner." *United States v. Porth*, 10 Cir., 1970, 426 F.2d 519, 523. *United States v. Daly*, 8 Cir., 1973, 481 F.2d 28, 29. The court was right in telling the jury so.

No other of Klee's assertions of error merits discussion.

Affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1794

OSCAR H. KLEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court or the Northern District of California, petitioner was convicted on three counts of willfully failing to file federal income tax returns, in violation of Section 7203 of the Internal Revenue Code of 1954, 26 U.S.C. 7203. He was sentenced to concurrent terms of six months' imprisonment. The court of appeals affirmed (Pet. App.). Petitioner here contends that he was prejudiced by the jurors' failure to heed the district court's admonition not to discuss the case among themselves during trial, that the jury was not properly instructed on the issue of willfulness, and that, although he was represented by retained counsel, he should also have been permitted to appear as counsel on his own behalf.

It was stipulated at trial that petitioner, a preparer of income tax returns, received taxable gross income of $10,621.55 during 1966, $17,504.23 during 1967, and $23,985.59 during 1968. The proof showed that petitioner filed no income tax returns until December 1971 for the years 1957 through 1968. At the time he filed, his failure to file was already under investigation by the Internal Revenue Service. The issue for the jury to decide was whether petitioner's prior failure to file had been willful.

1. Petitioner moved for a new trial on the basis of an affidavit signed by one of the jurors, stating that eleven of the fourteen jurors, disobeying admonitions of the court, had discussed the case among themselves during recesses and that nine of them had expressed premature opinions about petitioner's guilt. The district court denied the motion on the ground that petitioner had not shown that he had been prejudiced by the jurors' alleged misconduct. Petitioner apparently contends (Pet. 5-12) that such conduct constitutes *per se* grounds for reversal, citing *Winebrenner* v. *United States*, 147 F. 2d 322 (C.A. 8), certiorari denied, 325 U.S. 863. The question in that case, however, was whether the trial court could properly instruct the jurors that they could discuss and debate together about a case during the course of its trial; the Eighth Circuit concluded that such instructions were erroneous. In the instant case the court instructed the jury, consistently with *Winebrenner*, not to discuss the case until it was submitted to them. Thus there is no issue here concerning "the propriety of the admonition" (Pet. App. 3).

The court below properly determined that, in the absence of a showing of prejudice, the jurors' alleged disobedience of the admonition was not a basis for reversal (Pet. App. 3-4):

This is not a case that involves "any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury." *Remmer* v. *United States*, 1954, 347 U.S. 227, 229 nor does it involve the influence of the press upon the jury. *Silverthorne* v. *United States*, 9 Cir., 1968, 400 F. 2d 627.

What is involved here is the premature discussion among the jurors themselves about the case. Assuming that there was juror misconduct, it is still true that not every incident of juror misconduct requires a new trial. * * * The test is whether or not the misconduct has prejudiced the defendant to the extent that he has not received a fair trial. * * *

The juror's affidavit here does not assert that any of the jurors relied upon any evidence outside of the record in reaching their verdict, nor does it assert that any of the jurors actually decided upon the defendant's guilt before the case was submitted to them. The trial judge carefully examined the affidavit's allegations and ruled that even if everything in the affidavit were true a new trial was not required. Though the judge expressed his disapproval of such juror conduct, he commented that "the question is whether such conduct prejudiced defendant's right to a fair trial by an impartial jury." He correctly observed that "the only genuine issue in dispute was defendant's state of mind. On this point the jury demonstrated its open-mindedness by requesting re-reading of the instructions on willfulness before bringing in its verdict." The trial judge therefore held that "[u]nder all these circumstances the Court finds that the affidavit does not present any questions which requires [sic] further inquiry and does not justify a new trial."

> When a wise and experienced judge, who presided at the trial and observed the jury, comes to such a conclusion, it is not for us to upset it. The trial judge "was in a better position than we are to determine whether what happened was prejudicial." * * *

2. Contrary to petitioner's contention (Pet. 12-13), the trial court properly instructed the jury on the issue of willfulness. The court charged that "willfully," as used in Section 7203, means "voluntary, purposeful, deliberate and intentionally, as distinguished from accidental, inadvertent, or negligent" (Pet. App. 2, n. 1) and that "[t]here is no necessity that the government prove that the defendant had an intention to defraud it, or to evade the payment of any taxes * * * " (*ibid.*). This instruction conforms with this Court's determination in *United States* v. *Bishop*, 412 U.S. 346, 360, that "the word 'willfully' in these [criminal tax] statutes generally connotes a voluntary, intentional violation of a known legal duty."[1]

3. Petitioner also errs in contending (Pet. 13-14) that the trial court erred in ruling that since petitioner was represented at the trial by two attorneys, he could not at the same time represent himself. The court below concluded that petitioner's "obvious motive was to be able to spout his notions [that the income tax is unconstitutional] to the jury without having to take the witness stand" (Pet. App. 4) and that the trial court properly limited petitioner's courtroom activities while offering him the opportunity to participate at some stages of the trial. These rulings were proper. Cf. *Lofton* v. *Procunier*, 487 F. 2d 434, 435 (C.A. 9); *Nelson* v. *People of the State of California*, 346 F. 2d 73, 81 (C.A. 9).

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[1]A panel of the Seventh Circuit has concluded, contrary to the court below, that willfulness in failure-to-file cases under Section 7203 involves an intent to defraud, but that case is now before the full bench of that Circuit on the government's petition for rehearing *en banc*. *United States* v. *McCorkle*, No. 73-1084, decided April 8, 1974, petition for rehearing *en banc* granted July 12, 1974.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1974.

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